


Family Law News

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Prior to each issue of the Hamilton Law Association Journal, we ask our fellow colleagues of the Hamilton Bar if anyone has heard of or read any interesting cases. Without fail, our colleague and mentor, Gordon Morton, provides us with something interesting to report on. For this issue Mr. Morton referred us to a case from the Supreme Court of British Columbia called *Dreyer v. Murphy*, 2012 BCSC 1462.

This case was decided by the Hon. Mr. Justice Blok on October 2, 2012. It deals with a hefty claim for substantial retroactive section 7 expenses on behalf of a 19 year old child of non-married spouses. Section 7 expenses are part of both federal and provincial Child Support Guidelines and frequently form part of child support orders. Section 7 expenses can cover a number of different items ranging from daycare, to medical expenses over $100 annually, and post-secondary expenses, to name a few.

This case commenced as an Application by the payor father, Mr. Dreyer, for a declaration that his 19-year-old daughter was no longer a child pursuant to the *Family Relations Act* for the purposes of paying child support. Shortly after he initiated this request he was faced with a cross Application for special and extraordinary expenses totalling $89,000 for his then 19 year old daughter. The child had aspirations as a singer, songwriter and music performer and significant sums of money had been spent in an attempt to launch her career. She was no longer attending school on a full-time basis.

The applicant father did not have any contact with his child since August 2008 but the judge was of the opinion that this factual issue was not of importance in making this decision. The applicant did not have any information from the respondent mother or the child concerning the child's education, health or well-being and no requests or demands for contribution towards any section 7 expenses were made prior to the child's 19th birthday and were only made after he sought a declaration to cease paying child support.

Of note, child support orders had been made in the past for this child but the previous orders did not provide for the payment of section 7 expenses. The last order was a consent order between the parties dated December 11, 2006 requiring the applicant to pay child support in the fixed monthly sum of $1,110.00.

Counsel for the applicant father argued that the respondent mother did not have standing to request section 7 expenses for the child as the child was no longer a child for support purposes. Justice Blok referred to the Supreme Court of Canada's decision of *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] S.C.R. 231 at paras. 86 and 87, wherein the Supreme Court of Canada indicated that, based upon the statutory interpretation of the wording of the *Divorce Act,* "retroactive child support will only be available so long as the child in question is a 'child of the marriage' when the application was made". In *Dryer,* the parties were unmarried and, as a result, the claim was brought under B.C.'s provincial child support legislation, the *Family Relations Act.* The definition of "child" under the *Family Relations Act,* includes children under the age of 19 years, or over the age of 19, but unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life. As a result, the trial judge determined that the mother had no standing to bring an application on Danica's behalf for reimbursement of s. 7 expenses.

The mother's counsel then attempted to make an argument that since support orders had been applied for and granted in previous years when the child was unquestionably a child this provided a sufficient basis for the present application for retroactive section 7 expenses.

The trial judge reviewed a previous appellate decision from British Columbia, *Semancik v. Saunders*, 2011 BCCA 264, 19 B.C.L.R. (5th) 219. In that case, the B.C. Court of Appeal found a distinction between the Table amount of child support and section 7 expenses, citing a factual difference between these two types of parental contribution. In the case of Table child support, the payor parent`s income is determinative. That parent knows what his income is and can determine the proper amount of child support payable pursuant to the *guidelines*. In the case of section 7 expenses, the payor parent does not have this information as they may not have the details of the expense that the recipient parent has, or the recipient parent's income for determination of proportionate contribution. As a result, the Court held that it was inappropriate to permit a party to "bootstrap" a present application for section 7 expenses with the earlier applications for Table child support. This is slightly disconcerting in light of the presumptive rule under the *Guidelines* which provides that unless otherwise provided for under the *Guidelines,* the amount of child support is (a) the applicable table amount; and (b) the amount, if any, under s. 7.

Nevertheless, it is clearly advisable to counsel to instruct clients to make separate claims for both child support and special and extraordinary expenses; to include provisions for apportioning of s. 7 expenses even in the absence of any current expenses; and to instruct support recipients to remain diligent in the submission of claims and provision of information and receipts for s. 7 expenses incurred on behalf of their children. And, as in previous articles, we are again reminded of the need to have parents address retroactive claims prior to the termination of a child's status as a "child" or "child of the marriage", whatever the case may be.

Perhaps one day the prodigious child in this case will become a wealthy and famous Hollywood starlet, and Mr. *Dryer* will regret his decision to refuse to assist with her expenses. ■

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